

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 117 of 1981

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

PATHAN TALIBKHAN ABDUL R.

Versus

PATHAN HUSENKHAN ABDUL R.

Appearance:

MR DEEPAK M SHAH for Petitioner

MR BB NAIK for Respondent No. 1, 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 04/10/2000

ORAL JUDGEMENT

This appeal under section 100 CPC arises of the judgment and order dated 8th September, 1980, passed by the learned District Judge, Junagadh, in Regular Civil Appeal No. 66/77 arising of the judgment and order dated 31st March, 1977, passed by the learned Joint Civil Judge

(SD) Junagadh, in Regular Civil Suit No. 621/73. The appellant before this court is the plaintiff.

The plaintiff is the nephew of one Ibrahimkhan Husenkhan (son of the brother) and the defendants are the brother-in-law and the nephew of the said Ibrahimkhan Husenkhan (brother of the wife of Ibrahimkhan and son of the said brother). The said Ibrahimkhan owned a property bearing Sanad No. 261/73, situated in Bukar Maholla, in the town of Junagadh. The said property originally belonged to the ancestors of Ibrahimkhan and his brother Abdul Rahimkhan-the father of the plaintiff. The said Ibrahimkhan had instituted Regular Civil Suit No. 226/64 against his brother Abdul Rahimkhan for partition of the ancestral property and the possession thereof. The said suit was decreed in favour of the said Ibrahimkhan and in execution of the decree, the suit property came to the share of the said Ibrahimkhan and he was in possession of the said property. The wife of Ibrahimkhan died in the year 1968 and the said Ibrahimkhan also died on 29th October, 1973, leaving no heirs behind him. However, the defendants were at the relevant time, residing with the said Ibrahimkhan and continued to be in possession of the suit property. The plaintiff, therefore, instituted Regular Civil Suit No. 621/73 and claimed that he was the direct heir of the deceased Ibrahim and he was entitled to inherit the suit property. He, therefore, prayed for the possession of the suit property and some movable property like furniture and the mesne profit. The suit was contested by the defendant by filing written statement at Ex. 9. It was contended that the deceased Ibrahimkhan had given away the suit property to his wife Manuma in gift on 1st November, 1967. The fact of the said gift was recorded in the memorandum dated 26th April, 1968 (Ex.100). Since then, Bai Manuma had become owner of the suit property. She had mortgaged the upper storey of the suit property to one Arab Aba Said Bin Aba Mahamad Bin and Arab Aba Hasan Bin Aba Mahmad Bin of Junagadh for a sum of Rs. 5000/- and the deceased Ibrahimkhan, Bai Manuma and the defendants continued to reside in the ground floor of the suit property. Rent note (Ex.76) was executed under which said Ibrahimkhan agreed to pay rent to Bai Manuma for occupation of the ground floor of the suit property. However, Bai Manuma died in the month of November, 1968 and the said Ibrahimkhan and Bai Manuma having no issue of their own, the suit property, on the death of Bai Manuma, reverted back to the said Ibrahimkhan. After the death of Bai Manuma, said Ibrahimkhan, on 20th December, 1968, gave away the suit property to the defendant no.2 by an oral gift. The gift was accepted by the defendant no.2 and he

continued to reside in the suit property along with the said Ibrahimkhan. The said gift was acted upon and a rent note dated 17th September, 1969 (Ex-93) was executed, under which the said Ibrahimkhan agreed to pay rent to the donee defendant no.2 and continued to reside in the suit property. The fact of the said gift was recorded in the memorandum dated 18th September, 1969 (Ex-92). The said memorandum has been witnessed by 7 persons named therein. After the said gift, the said Ibrahimkhan died on 29th October, 1973. Thus, the defendant no.2 had become the sole owner of the suit property and the plaintiff had no claim over it.

The learned trial Judge has held that the gift made by the deceased Ibrahimkhan in favour of Bai Manuma and the subsequent gift in favour of the defendant no.2 were complete and are proved. Hence, at the time of the death of the said Ibrahimkhan, defendant no. 2 was the sole owner of the suit property and the plaintiff could have no right to inherit the same. The learned trial Judge, accordingly, dismissed the suit. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 66/77 in the District Court, Junagadh, which too has been dismissed by the learned District Judge, Junagadh, on 8th September, 1980. Feeling aggrieved, the plaintiff has preferred the present appeal.

Following questions of law have been framed by this court while admitting the appeal :

- (1) Whether in the facts and circumstances of the case, the courts below have erred in law in not holding that both the gifts at Ex. 100 and 92 not being according to Mohmedan Law, Registration Act and Stamp Act are not proved and there is no valid and legal transfer at all by deceased Ibrahim in favour of the respondent, while the plaintiff legally inherits the properties in question.
- (2) Whether in the facts and circumstances of the case, the courts below have erred in deciding the questions of validity of both the gifts without framing issues in that respect and without giving proper opportunity to the plaintiff on the question.
- (3) Whether in the facts and circumstances of the case and Ibrahim having shown to be the owner by Ex. 26, 27 and 37 which are the public documents

and in failure to prove the contents of Exh. 100, 77, 98, 92 and 93 by the defendants, the lower court in law in holding gifts to be valid in favour of deceased Manuma and later on in favour of the defendant when title of the property never passed on deceased Manuma and/or the defendant.

Mr. Naik has submitted that the question whether the gift made by the deceased Ibrahimkhan in favour of Bai Manuma, and subsequently to defendant no.2 were valid or not is a question of fact, and both the courts below have held both the gifts to have been proved and the said finding recorded by the courts below should not be interfered with by this court in the present appeal. He has submitted that under the Mohammedan Law, the party is empowered to make an oral gift and the necessary ingredients are - (a) There shall be a gift of the property by the donor; (b) the gift shall be accepted by the donee; (c) possession of the property should be handed over to the donee. In the present case, all the three ingredients are satisfied and, therefore, the gifts are rightly held to have been validly made. He has submitted that since the gift in question was an oral gift, the question of registration thereof or of payment of stamp duty does not arise. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of VALIA PEEDIKAKKAUDI KATHESSA UMMA & ORS Vs. PATHAKKALAN NARAYANATH KUNBAMU & ORS (AIR 1964 SC 275).

Ex. 26 is an electricity bill of the suit property for the month of April, 1974. The bill has been made in the name of the deceased Ibrahimkhan Husenkhan. Ex. 27 is the demand notice dated 5th October, 1971 for the Education Cess on the suit property since 1st August, 1968. It has been made in the name of Abdul Rahimkhan Husenkhan-the father of the plaintiff and the deceased Ibrahim Husenkhan. Ex. 37 is the copy of the complaint made by the deceased Ibrahimkhan against the plaintiff and one another in respect of some damage allegedly caused to the suit property by the accused-present plaintiff and one another. In paragraph-3 of the said complaint dated 11th July, 1968, the deceased Ibrahimkhan has described the suit property as his own property. Ex.76 is the rent note under which the said Ibrahimkhan agreed to pay to Bai Manuma rent for his occupation of the suit property. Ex. 78 is a writing made by the deceased Ibrahimkhan, captioned as "Vasiat". Ex. 92 is the memorandum dated 18th September, 1969, evidencing the

gift of the suit property made to the defendant no.2. Ex. 93 is the rent note under which the deceased Ibrahimkhan agreed to pay rent to the defendant no.2. Ex. 100 is the memorandum dated 26th April, 1968, executed by the deceased Ibrahimkhan in respect of the gift of the suit property made to Bai Manuma on 1st November, 1967. The above referred documents do prove that the deceased Ibrahimkhan had strained relations with his brother Abdul Rahimkhan and his son Talibkhan-the plaintiff. The deceased Ibrahimkhan had filed a suit for partition of the ancestral property and had received the suit property on such partition in execution of the decree passed by the Civil Court. The deceased Ibrahimkhan and his wife Bai Manuma had no child and had accepted the defendant no.1 Abbaskhan-son of the brother of Bai Manuma as their own son and had raised him right since he was six months old, and had also given him education. Even the school records show that the name of the deceased Ibrahimkhan was entered as the father of the pupil-Abbaskhan. The suit property was given to Bai Manuma in gift and after the said gift Bai Manuma had mortgaged part of the suit property and the deceased Ibrahimkhan had agreed to pay rent to Bai Manuma; after the death of Bai Manuma, the suit property was given to the defendant no.2 in gift; Ibrahimkhan continued to stay in the suit property with the defendant no. 2, and the deceased Ibrahimkhan agreed to pay rent to the defendant no.2. Both the defendants continued to stay with the deceased Ibrahimkhan after the death of Bai Manuma and also looked after him till his death. In the matter of Valia Peedikakkandi (supra), similar was the issue before the Hon'ble the Supreme Court. The law on the point has been discussed by the Hon'ble Supreme Court in paragraph-11 of the judgment. It is held that - " It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor, he must depart from it and the donee must enter upon possession. The strict view was that the donor must not leave behind even a straw belonging to him to show his ownership and possession. Exceptions to these strict rules which are well recognised are gifts the by wife to the husband and by the father to his minor child. (Macnaghten P. 51, principles 8 and 9). Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife."

Considering the facts of the present case, it is established that the deceased Ibrahimkhan had an intention to give the suit property to the defendant no.2 in gift. Accordingly, had made an oral gift in favour of the defendant no.2 on 20th December, 1968, and had handed over possession of the suit property to the defendant no.2. The gift was recorded in the memorandum dated 18th September, 1969 (Ex.92), and the deceased Ibrahimkhan continued to reside in the suit property along with the defendant no.2 and agreed to pay rent for the same. Considering the law as laid down in the above referred judgment, it can not be said that the gift in favour of the defendant no.2 was not complete or was not valid. As recorded hereinabove, the defendant no.2 was residing with the deceased Ibrahimkhan and his wife Bai Manuma since the age of six months and till the death of the said Ibrahimkhan. Hence, for the gift being complete, the deceased Ibrahimkhan was not required to hand over the possession of the suit property to the defendant no.2 and to walk out of the suit property. An overt act on the part of the deceased Ibrahimkhan of handing over the possession was sufficient to complete the gift. Such overt act is established by rent note Ex. 93 under which the deceased Ibrahimkhan agreed to pay rent to the defendant no.2 for his occupation of the suit property. Further section 129 of the Transfer of Property Act, 1882, excludes the gift governed by Mohmedan Law from the application of Chapter-VII of the said Act. The question of registration of such gift or payment of stamp duty thereon would not arise. Hence, on the date of the death of the deceased Ibrahimkhan, the suit property belonged to the defendant no.2, and the plaintiff could have no right to inherit the same.

The questions are answered accordingly.

The appeal is dismissed with cost.

[Miss R.M Doshit, J.]

JOSHI*